

LOCAL AGENCIES OF THE NORTH DELTA

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Local Agencies of the North Delta White Paper Concerns Regarding Proposition 1: The Water Quality, Supply, and Infrastructure Improvement Act of 2014

Summary

The voter-approved November 2014, Proposition 1: the Water Quality, Supply, and Infrastructure Improvement Act of 2014, a \$7.5 billion water bond, included \$2.7 billion for investments in water storage projects allocated to the California Water Commission ("CWC").¹ In July 2015, the CWC began a series of meetings to discuss the development of regulations pursuant to the statutory mandates of the Water Storage Investment Program. Based on the information presented at these meetings, Local Agencies of the North Delta ("LAND") is concerned that certain funding limitations in Proposition 1 may be overlooked when funds are awarded. In particular, it appears that funding for actions that are compliance obligations of the state and federal water projects may be considered, which is specifically prohibited in Proposition 1.

Applicable Funding Limitations

Specifically at issue are the CWC's position and interpretations of the following Water Code sections:

Water Code, § 79701(h) (Findings)

"Sustainable water management in California depends upon reducing and reversing overdraft and water quality impairment of groundwater basins. Investments to expand groundwater storage and reduce and reverse overdraft and water quality impairment of groundwater basins provide extraordinary public benefit and are in the public interest."

Water Code, § 79701(i) (Findings)

"Protecting lakes, rivers, and streams . . . [is] crucial to providing a reliable supply of water and protecting the state's natural resources."

¹ Proposition 1, available at: http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1451-1500/ab_1471_bill_20140813_chaptered.pdf.

Water Code, § 79709(c) (Chapter 4 General Provisions)

“Funds expended pursuant to this division for any acquisition of water shall only be done pursuant to this section and shall only be used for projects that will provide fisheries or ecosystem benefits or improvements that are greater than required applicable environmental mitigation measures or compliance obligations in effect at the time the funds from this division are made available for the project and funds shall not be credited to any measures, and or obligations, except for any water transfers for the benefit of subsection (d) of Section 3406 of the Central Valley Project Improvement Act (Title 34 of Public Law 102-575)”

Water Code, § 79710(a) (Chapter 4 General Provisions)

“Funds provided by this division shall not be expended to pay the costs of the design, construction, operation, mitigation, or maintenance of Delta conveyance facilities. Those costs shall be the responsibility of the water agencies that benefit from the design, construction, operation, mitigation, or maintenance of those facilities.”

Water Code, § 79753(a) (Chapter 8 Public Benefits Eligible for Funding)

(a) Funds allocated pursuant to this chapter may be expended solely for the following public benefits associated with water storage projects:

(1) Ecosystem improvements, including changing the timing of water diversions, improvement in flow conditions, temperature, or other benefits that contribute to restoration of aquatic ecosystems and native fish and wildlife, including those ecosystems and fish and wildlife in the Delta.

(2) Water quality improvements in the Delta, or in other river systems, that provide significant public trust resources, or that clean up and restore groundwater resources.

(3) Flood control benefits, including, but not limited to, increases in flood reservation space in existing reservoirs by exchange for existing or increased water storage capacity in response to the effects of changing hydrology and decreasing snow pack on California's water and flood management system.

(4) Emergency response, including, but not limited to, securing emergency water supplies and flows for dilution and salinity repulsion following a natural disaster or act of terrorism.

(5) Recreational purposes, including, but not limited to, those recreational pursuits generally associated with the outdoors.

Water Code, § 79753(b) (Chapter 8 Limitation of Funding Public Benefits)

“Funds shall not be expended pursuant to this chapter for the costs of environmental mitigation measures or compliance obligations except for those associated with providing the public benefits as described in this section.”

Discussion

The State Water Project (“SWP”) and the Federal Central Valley Project (“CVP”) (collectively, “the Projects”) includes a complex system of water storage and transfer operations that export millions of acre feet of water out of the upper Sacramento River tributaries and ultimately out of the Sacramento and San Joaquin Delta. These exports have had significant environmental impacts and are subject to permit requirements, including specific water quality standards and other related mitigation requirements. These key provisions are included in the State Water Resources Control Board 1995 Bay-Delta Water Quality Control Plan (“WQCP”), D-1641², D-1485, and the Long-Term Operational Criteria and Plan (“OCAP”) ³ and the associated Biological Opinions (“BO”).

These interrelated water flow and quality requirements have a narrow purpose, which is to mitigate for the environmental impacts of the Projects on the environment: “The various flow objectives and export restraints are designed to protect fisheries. These objectives include specific outflow requirements throughout the year, specific export restraints in the spring, and export limits based on a percentage of estuary inflow throughout the year. The water quality objectives are designed to protect agricultural, municipal and industrial, and fishery uses, and they vary throughout the year and by the wetness of the year.” (OCAP, p. 21 (describing D-1641).) In addition, protection of habitat is also a required mitigation in the BO.

Despite the clear statutory restrictions identified in Water Code sections 79709(c), 79753(b) and 79710(a), the CWC and/or its staff appear to be considering funding of mitigation requirements for the Projects. This is unacceptable and contrary to the clear statutory direction in Proposition 1 with respect to permitted expenditures.

Within the storage chapter of Proposition 1, section 79753(b) clearly prohibits the funding of environmental mitigation measures or compliance obligations of the Projects.

² Available at:
http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf.

³ Available at: http://www.fws.gov/sfbaydelta/documents/SWP-CVP_OPs_BO_12-15_final_OCR.pdf.

General funding limitations applicable to the entire bond in sections 79709(c) and 79710(a) also prohibit funding of compliance obligations, as well as mitigation for the Projects specifically. The CWC's misdirection appears to be based on a misunderstanding of the exception in section 79753(b) for funding of public benefits. Yet the SWP and CVP are required to complete environmental water transfers, implement conjunctive use and substitution programs, reservoir reoperations, and additional storage projects. These are existing *mitigation* and *compliance* requirements, not public benefits. The restrictions against bond funding for these activities as it relates to the SWP and CVP are clearly stated in both 79753(b) and 79710(a), which refer to the current use and operations of Delta facilities.

Measures that already must be taken by the SWP-CVP Delta conveyance facilities to comply with D-1641 standards are not the type of public benefits that are eligible for funding under Proposition 1. Moreover, there is a history of public funds being used for acquisition of so-called environmental water that has not led to corresponding benefits to fisheries that must not be repeated.⁴ Compounding the potential for misuse of bond funds, the Delta Tunnels project also will rely on water purchases of up to 1.3 million acre feet per year to meet bypass flow requirements past the proposed new Sacramento River intakes. Documents dating back to at least 2012 indicate that the Tunnel proponents have been lobbying to ensure that these water purchases would be publicly funded. The CWC must clarify its legal position with respect to following the applicable statutory/Constitutional requirements as well as the campaign promises made that Proposition 1 was "Tunnel Neutral".

LAND is also concerned that although reduction and reversal of groundwater overdraft is a goal under section 79701(h), the CWC Program does not appear to be implementing that provision. For instance, by failing to require demonstrable and calculable benefits to groundwater, the Program could actually fund so-called "conjunctive use" projects that further unsustainable groundwater use, and harm the environment by depleting small streams. This issue also must be squarely addressed in the regulations being developed by CWC.

⁴ See Taugher, Mike, *Harvest of Cash*, Contra Costa Times, August 9, 2008, available at: http://www.contracostatimes.com/ci_10152127.

Conclusion and Request

The legislative compromise that ultimately resulted in the passage of Proposition 1 clearly excluded funding of the compliance and mitigation measures of the Projects. Moreover, Proposition 1 includes critical direction with respect to funding of projects that result in reversal of groundwater overdraft. The transcript that follows validates the need for the Legislature and others with statutory authority to provide oversight of the development of regulations implementing Proposition 1 to prevent the unpermitted expenditure of funds on the compliance obligations of the Projects, and more broadly, to ensure that Proposition 1 results in the benefits that the voters were promised. If there is simply a miscommunication of the CWC intent in the context of the questions, or there is some administrative confusion, it is critical that the CWC state in clear terms how its program will be consistent with the funding requirements of Proposition 1.

Transcript
California Water Commission
Water Storage Investment Program
July 30, 2015 Public Meeting
Davis Veterans Memorial Center, 203 E 14th Street, Davis, CA 95616

Speakers

Juliana Birkhoff – Center for Collaborative Policy

Rachel Ballanti – Assistant Executive Officer, California Water Commission

Scott Cantrell – Chief, Water Branch, California Fish and Wildlife Department

Gail Linck – Incoming Environmental Program Manager, State Water Resources Control Board

Jenny Marr – Project Staff, California Water Commission

Erik Ringelberg – LAND representative

Questions for Scott Cantrell Regarding Ecosystem Benefits

Erik Ringelberg: The ecosystem priorities, still a draft?

Scott Cantrell: Yes. They're still draft.

Erik Ringelberg: So I want to be clear. I am fully supportive of the priorities. I have one concern; sort of one question, then. One is really, the overarching concern that the mitigation fund despite the statutory requirements gets used to facilitate either the biological opinions or the Bay Delta Conservation Plan – That's sort of an overarching concern. Because there are many good things in those priorities, but those priorities could be used for project level benefits.

Scott Cantrell: I believe there is a prohibition in the bond language. This is it can't fund mitigation. Is that right?

Erik Ringelberg: That is correct. Mitigation or more importantly compliance obligations, which is the door open for those [conflicts]. But I think my questions then is. . .

Juliana Berkhoff: So let me just . . . so that question was answered?

Erik Ringelberg: That wasn't a question. It's a comment.

Juliana Berkhoff: It was a comment. Oh, okay. Thank you. Thanks.

Erik Ringelberg: Basically it's a concern. But I think the conjunctive use impacts, which actually the statute tried to get to, which was to reduce the rate or reverse the decline of shallow ground water. Particularly when it comes to fisheries, we have a problem with conjunctive use where the tributaries are impacted for the sake of water transfers, and because it is very difficult to actually measure that in the real world. There is a lot of sort of numerical shuffling for those activities. It concerns me that there is not a clear articulation of the statute back into the [grant funding] direction for this. That the net difference of ground water [elevation] should ultimately be increased or the rate of reduction decreased.

Juliana Berkhoff: Okay.

Erik Ringelberg: Does that make sense?

Juliana Berkhoff: Thanks.

Scott Cantrell: Yeah. That makes sense.

Questions after Gail Linck's Presentation Regarding the Water Board's Water Quality Priorities

Erik Ringelberg: So it seems to me that several of the state priorities run in direct conflict with the compliance obligations. So D1641 – Salinity Control in the Delta – that is an obligation by the projects and by increasing water availability for outflow for them to meet 1641 would be a private benefit using these funds. Do you agree?

Jenny Marr: The statute allows . . . in Chapter 8, it says, and I can't quote it directly, but to the effect that the funds cannot go to mitigation and compliance obligations, except in the provisions of public benefits so water quality improvements would be considered a provision of public benefits.

Erik Ringelberg: So mitigation for the state and federal water projects to meet their compliance obligations would be considered public benefit?

Jenny Marr: I think we will need to look at that at a case by case basis.

Erik Ringelberg: Okay. Thank you.